The 2000 Amendments to the Federal Rules of Civil Procedure & Evidence: A Preliminary Analysis

Gregory P. Joseph*

These materials are designed to accompany the ALI-ABA broadcast *New Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence,* rebroadcast on the Federal Judicial Television Network. These materials are made available to members of the judiciary who view the broadcast via the FJTN. Any other use without permission of ALI-ABA is prohibited. The opinions are those of the author, not necessarily those of the Federal Judicial Center.

* Partner, Fried, Frank, Harris, Shriver & Jacobson (Chair, Litigation Department). Fellow, American College of Trial Lawyers. Former Chair, American Bar Association Section of Litigation (1997-98) and member, U.S. Judicial Conference Advisory Committee on the Federal Rules of Evidence (1993-99).

CONTENTS

I. Civil Procedure Amendments

The amendments to the Federal Rules of Civil Procedure effective as of December 1, 2000, will have a significant effect on discovery practice. All of the effects, however, may not be intended. The amendments affect Rules 5(d), 26(a)(1), 26(b)(1)-(2), 26(d), 26(f), 30(d), and 37(c).

A. Rule 5(d): Public Access to Discovery Materials

One of the seemingly most innocuous changes involves Rule 5(d), but the amendment is in fact far from innocuous. It is likely to have an important impact on the confidentiality of discovery materials. The current version of Rule 5(d) provides that "[a]ll papers after the complaint required to be served upon a party ... shall be filed with the court," but it permits the court to exempt discovery materials unless or until they are used in the proceeding. The exemption has become the rule. As a matter of practice, discovery materials are rarely filed (until used) because the clerks simply have no space to store them.

The amended version of Rule 5(d) seems merely to capture this practice, affirmatively barring the filing of discovery and disclosure materials. It provides that they "must not be filed until they are used in the proceeding or the court orders filing . . . ."

1. Impact on Access to Discovery Materials.

But the current version of Rule 5(d) has an impact far broader than the simple question whether discovery materials may, should or must be filed with the clerk. It has played a large role in determining the extent to which discovery materials are accessible by third parties not involved in a litigation.

Generally, neither the public nor the press generally has a First Amendment or common law right to inspect discovery documents, under the Supreme Court's decision in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). The current version of Rule 5(d), however, has been held to create a presumptive right of access to discovery material, unless good cause for confidentiality is shown under Rule 26(c). The 1980 Committee Note observes that discovery "materials are sometimes of interest to those who may have no access to them except by a requirement of filing. . . ."

The filing obligation of the present Rule 5(d) has been a linchpin of several decisions finding a statutory public right of access to discovery materials, shifting the battleground to whether good cause for confidentiality has been shown, within Rule 26(c). *See, e.g., Public Citizen v. Liggett Group, Inc.,* 858 F.2d 775, 780, 788-90 (1st Cir. 1988); *In re "Agent Orange" Prod. Liab. Lit.,* 821 F.2d 139, 146-47 (2d Cir.), *cert. denied*, 484 U.S. 953 (1987).

The new version of Rule 5(d) will undercut that portion of the public-access rationale that has been predicated on the notion that, even though discovery materials are no longer actually filed, the filing requirement still triggers application of the "judicial record" doctrine—i.e., the doctrine that documents required to be filed in court are presumptively available to the public. The entire rationale for public access will not necessarily disappear, however. For ex-

ample, it would appear to survive to the extent that it rests on a construction of Rule 26(c) holding that, absent a showing of good cause, discovery "discovery materials . . . should not receive judicial protection and therefore would be open to the public for inspection." *Agent Orange,* 821 F.2d at 145.

There are, however, serious doubts as to whether the presumption of public inspection or access can be inferred from the text of Rule 26(c) in the absence of the current version of Rule 5(d). At best, the argument appears to devolve to the question of whether public access should be construed from the negative pregnant in such subdivisions as Rule 26(c)(5) (which authorizes the court to order "that discovery to be conducted with no one present except persons designated by the court"). Does that really express an implicit right on the part of anyone who desires to be present to do so? Certainly, there are some forms of discovery as to which no one would so construe it (*e.g.*, a Rule 35 medical examination). And there are others as to which it simply does not work (*e.g.,* documentary discovery responses like interrogatory answers).

2. Importance of Protective Orders

Moreover, blanket or umbrella protective orders are routinely entered by agreement under Rule 26(c) in commercial and many other sorts of federal litigation. The transformation of Rule 5(d)'s filing requirement into a filing prohibition, particularly in light of a Rule 26(c) protective order, will substantially change the debate when third-party access is sought. Indeed, this change emphasizes the importance of a Rule 26(c) protective order as a deterrent by parties wishing to maintain the confidentiality of their information.

Note that the amendment to Rule 5(d) will also operate to preclude the filing of discovery materials, in those districts in which it is currently permitted, for the purpose of making documents public. The Committee Note provides that this amendment "supersedes and invalidates local rules that forbid, permit, or require filing of these materials before they are used in the action." However, nothing will prevent the filing of a motion with discovery materials appended. At that point, if a Rule 26(c) protective order is in place, the type of motion filed—or use of the materials by the court—may dictate whether public access to the materials is permitted. *See, e.g., Leucadia, Inc. v. Applied Extrusion Techs., Inc.,* 998 F.2d 157, 163-165 (3d Cir. 1993) (materials accompanying substantive, but not discovery, motions are available to the public); *United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995) ("the weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts")

B. Rule 26(a)(1): Mandatory Disclosure

The most controversial amendments to the Rules this year affect Rule 26. Under the amendments to Rule 26(a)(1), mandatory disclosure simultaneously becomes (i) universally mandatory, (ii) generally toothless, but (iii) a dangerous trap for the unwary. New Rule 26(a)(1) will no longer permit individual district courts to opt out of mandatory disclosure. It will apply everywhere,

with two caveats. First, any party may object to it, and, second, certain limited categories of cases are excluded. These disclosures are due within 14 days after the Rule 26(f) conference (which translates to 83 days after the defendant has appeared and 113 days after the complaint has been served).

Rule 26(a)(1)(A) and (B) will generally require the disclosure, at the outset of the litigation, of the identities of witnesses and documents "that the disclosing party *may use to support its claims or defenses, unless solely for impeachment* . . . ." That is far more limited that their current requirement of disclosure of such information "relevant to disputed facts alleged with particularity in the pleadings." It is so limited that one is tempted to ask what the point is, since all of this information already must ultimately be disclosed no later than the pretrial order (or default disclosure provision, Rule 26(a)(3)). The Committee Note provides that "[a] party is no longer to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use." But the situation is considerably knottier than that.

To begin with, "use" is defined in the Note to include "*any use* at a pretrial conference, to support a motion, or at trial." Further, if disclosure is not made as required by Rule 26(a)(1), and the information is not timely supplemented as required by Rule 26(e)(1), then it is presumptively subject to automatic exclusion under Rule 37(c)(1). This is a serious risk, and it applies to pretrial motion practice as well as at trial. *See, e.g., Sears, Roebuck & Co. v. Goldstone & Sudalter*, 128 F.3d 10, 18 n.7 (1st Cir. 1997) (affirming exclusion of affidavit submitted on summary judgment because affiant had not been identified as a knowledgeable witness pursuant to Rule 26(a)(1)).

The exception to mandatory disclosure, contained in the phrase "unless solely for impeachment," should also be viewed warily. It is drawn from existing Rule 26(a)(3) (the disclosure provision that kicks in if no pretrial order is entered). Many documents that are offered for impeachment purposes also have non-impeachment qualities that advocates will be loath to lose. For example, a prior statement by an adverse party, which is also an admission, is admissible for its truth, not merely to impeach, under Rule 801(d)(2). Similarly, a learned treatise used to cross-examine an expert under Rule 803(18) is admissible "for the truth of the matters asserted, not just for impeachment purposes." 3 Saltzburg, Martin & Capra, FEDERAL RULES OF EVIDENCE MANUAL 1697 (7th ed. 1998). (The latter example raises separate disclosure issues under Rule 26(a)(2)(B), as well, if the learned treatise is to be authenticated by the cross-examiner's expert. *See* Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 110 (1996).)

The mandatory disclosure obligation of Rule 26(a)(1) is subject to the supplementation duty of Rule 26(e)(1), which was broadened substantially in 1993. The former knowing-concealment standard was abandoned. A party is instead obliged to amend any disclosure if it is later deemed "incomplete or incorrect." Fed. R. Civ. P. 26(e)(1). These supplemental disclosures must be made "at appropriate intervals."

1. Exempt Categories

Eight categories of cases are altogether exempt from mandatory disclosure under Rule 26(a)(1). They are: administrative appeals, habeas cases, *pro se* prisoner proceedings, attempts to quash administrative summonses or subpoenas, actions by the United States to recover benefit payments or collect on government-guaranteed student loans, proceedings ancillary to proceedings in other courts, and actions to enforce arbitration awards.

2. Stipulations & Objections

The parties may stipulate away the duty to make mandatory disclosures. Absent a stipulation, any party has the right to object to making mandatory disclosure during the Rule 26(f) conference. As long as the objection is stated in the Rule 26(f) discovery plan, there is no duty to make disclosure until the judge resolves the issue. Oddly, the Rule is written so that, if a party is joined after the Rule 26(f) conference, there is no apparent right to object. As a practical matter, this would simply put the burden on that party of bringing the issue to the attention of the court (whose ruling on any prior objection no doubt set the tone for the parties to attempt to resolve the issue among themselves).

3. Discovery vs. Disclosure

The 1993 Committee Note to Rule 26(a) recites that "parties are not precluded from using traditional discovery methods to obtain further information regarding these matters" (i.e., matters that are subject to mandatory disclosure). Courts have looked to this language, and to Rule 26(a)(5)—the paragraph that has for years identified the traditional methods of discovery permitted by the Federal Rules (depositions, interrogatories, production of documents, and the like)—in concluding that additional discovery in the subject areas covered by Rule 26(a)(1), (2) and (3) is generally available. *See, e.g., Corrigan v. Methodist Hosp.*, 158 F.R.D. 54 (E.D. Pa. 1994).

C. Rule 26(b)(1): Limits on Scope of Discovery

One of the most controversial amendments will narrow the scope of discovery, as provided in Rule 26(b)(1), by deleting authority to conduct discovery into any matter, not privileged, that is "relevant to the subject matter involved in the pending action." Instead, discovery will be confined to matters "relevant to the claim or defense of any party." The new Rule adds that, "[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action."

1. Attorney- vs. Court-Managed Discovery

The amendment is intended to create a dichotomy between (1) the narrower category of attorney-controlled or attorney-managed discovery, which consists of matters "relevant to [a] claim or defense," and (2) the broader category of court-managed discovery, which may encompass anything "relevant to the subject matter." The accompanying Committee Note explains that the "amendment is designed to involve the court more actively in regulating the breadth or sweeping or contentious discovery." Many courts, however, are not

eager to become more actively involved in discovery of any kind. Nonetheless, it is likely that this amendment will have several effects, one of which will certainly be to develop a new body of case law distinguishing between matters "relevant to [a] claim or defense" and those merely "relevant to the subject matter."

The Committee Note attempts to provide some guidance, and the Note is important because it would appear to retreat a step or two from the dichotomy stated in the text of the Rule—or, at least, provides an expansive view of the claim-or-defense standard. It states, for example, that "other incidents of the same type, or involving the same product, could properly be discoverable under the revised standard." One would have thought that this might be deemed "subject matter," in the absence of the Note. The position taken in the Note, however, appears to be a fair interpretation of the new definition of "relevant."

2. "Relevan[ce]"

"Relevant" is now defined using a variant of the language that formerly provided that "information . . . need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." The language now reads: "*Relevant* information need not be admissible at the trial if the *discovery* appears reasonably calculated to lead to the discovery of admissible evidence." The purpose of this change, according to the Committee Note, was "to clarify that information must be relevant to be discoverable, even though inadmissible, and that discovery of such material is permitted if reasonably calculated to lead to the discovery of admissible evidence."

The effect is to broaden the scope of "relevant"—as the term is used in conjunction with "claim or defense"—to pick up essentially all admissible evidence. Thus, for example, the Note further observes that "information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might properly be discoverable." Changing the former "reasonably calculated" language into a definition of "relevant" was designed, according to the Advisory Committee, to prevent it from largely "swallow[ing] any other limitation on the scope of discovery." While it seems to broaden the concept of "claim or defense" considerably, given the stated distinction between "claim or defense" and "subject matter," it is clear that it does not extend all the way to "subject matter." The rulemakers are drawing a line in the sand (even if the sand is shifting).

3. Impact on Pleading

For decades, it has been a truism that the Federal Rules contemplated notice pleading. Rule 8(a) requires only "a short and plain statement of the claim," and Rule 8(b) similarly requires that defenses are to be "state[d] in short and plaint terms." If, however, the key to discoverability under Rule 26(b)(1) is the "claim or defense," a more elaborate statement of the claim or defense may be necessary to obviate successful resistance to legitimate discovery. Courts that have in the past lost patience with claims not stated shortly and plainly will

have to recognize that the drafters have now built in a tension between Rules 8 and 26.

It would be reasonable to anticipate more Rule 12 motion practice, including Rule 12(f) motions to strike, which in the past have often not been worth making but which now may have a discernible impact on the scope of discovery. Judges not eager to hear more discovery disputes are not likely to be excited by the prospect of more motion practice devoted to the pleadings, but the drafters determined otherwise.

D. Rule 26(b)(2): Elimination of Opt-Out

Unlike the amendment to Rule 26(b)(1), the amendment to Rule 26(b)(2) is not controversial. While permitting case-specific orders limiting the number of depositions or interrogatories, or the length of depositions, the amendment forecloses the use of a local rule to limit these items, although it allows a local rule to limit the number of requests for admission that may be made under Rule 36. The rationale is that Rules 30, 31 and 33 already state national limits on depositions and interrogatories, so that any variance should be case-specific.

E. Rule 26(d): Moratorium on Discovery

The new version of Rule 26(d) similarly deletes the option for a local rule to opt out of this provision. Subdivision (d) pegs the commencement of discovery to the parties' Rule 26(f) discovery conference, and it imposes a moratorium on discovery prior to that date (except in the eight categories of cases exempt from Rule 26(a)(1) disclosure, as discussed above). The elimination of the opt-out is important for practical purposes because, in several districts which had opted out of Rules 26(d) and (f), it was not entirely clear just when discovery was to commence.

F. Rule 26(f): Discovery/Settlement Conference

The amendment to Rule 26(f) also prohibits the use of a local rule to opt out of this subdivision. It provides that the mandatory discovery/settlement conference between the parties must occur at least 21 (rather than the former 14) days before the Rule 16(b) scheduling conference is held or a scheduling order is due. The Rule 16(b) order is due within 90 days after the appearance of a defendant and within 120 days after the complaint has been served. Accordingly, the Rule 26(f) conference generally must occur within 69 days after the defendant has appeared (and 99 days after the complaint has been served). No discovery is permitted before that date, absent court order, per Rule 26(d) (except in the eight categories of cases exempt from disclosures under Rule 26(a)(1)).

Rule 26(f) has also been amended to make it clear that the parties need only "confer" and not necessarily "meet" in connection with their discovery plan. Since practitioners commonly "met" by telephone prior to this amendment, it is a felicitous example of moving the sidewalk to where the people are walking.

G. Rule 30(d): Limits on Depositions

1. Instructions Not to Answer

There are two principal amendments to Rule 30(d). Subdivision (1) has been amended to clarify that the general prohibition against instructions not to answer is not limited to a "party" but also extends to a "person." This clarification prevents, for example, counsel to an unaffiliated witness from claiming the right to instruct the witness not to answer, despite the terms of the rule. This amendment reflects the way the current version of Rule 30(d)(1) has been understood—the first sentence of the text refers to "[a]ny objection," rendering the term "party" in the second sentence inherently ambiguous. As a consequence, this amendment does not signal a change in practice.

2. Seven-Hour Presumptive Limit on Depositions

A singular change in deposition practice is reflected in Rule 30(d)(2), which imposes a presumptive temporal limit on each deposition—"one day of seven hours," unless otherwise authorized by the court "or stipulated by the parties." This seven-hour limit has several important features to it.

First, the *parties* may stipulate around it. Given the distinction drawn in Rule 30(d)(1) between a "party" and a "person," the reference to "parties" in Rule 30(d)(2) must be deemed intentional. That means that, in the instance of a deposition is of a third-party witness, the parties may agree among themselves to a deposition longer than "one day of seven hours," and the witness has no say in the matter (his or her only resort will be to the court).

Second, Rule 30(d)(2) contemplates that the seven hour deposition will be completed in *one day*, "on the assumption that ordinarily a single day would be preferable to a deposition extending over multiple days," according to the Committee Note.

Third, the Committee Note provides that the deposition of *each person*6)(2uendmaselvesThis

over multiocuamendmrs,"less n th re
2uendmaion agathat the seven hour a

Committee does not address the equally likely scenario in which—even if the documents are sent and the witness does review them—there are so many that the witness cannot possibly remember them all and must consult them carefully when being questioned. If the witness is not acting in good faith, the examiner has shown part of his or her hand for nothing. If the witness is acting in good faith (but the examiner is not), and if this constitutes a reason to prolong the deposition, then any examiner can circumvent the seven-hour limit by the simple expedient of flooding the witness with materials to review in advance.

H. Rule 37(c)(1): Expansion of Preclusion Sanction

The amendment to Rule 37(c)(1) expands the sanction of automatic preclusion of evidence. Currently, if information or materials should have been, but were 2, disclosed pursuament to Rul26(aot)s tyre areubjecent tf automatin

e(c)2ot)r is n,sunltnessuchod fiedurr iharmltne, perommitd t tuoelthsf ere-)TjT*0.2775 Tc026

A significant motivation for this amendment was to put the bar on notice of what is expected of lawyers who make *in limine* motions and later want to appeal the results. Evidentiary issues are increasingly resolved prior to trial, and few judges want to revisit at trial issues that they have thoroughly considered earlier. The admissibility issue is, therefore, often not raised again at trial—but, at present, that can lead to forfeiture of the issue on appeal. The great virtue of this amendment is to (1) remind litigants that it is essential to make a record to preserve appealability, and (2) specify the nature of the record that must be made—namely, that the pretrial decision is "definitive."

2. Amendment Extends Beyond *in Limine* Practice

Notice that, although a split in the courts of appeals on *in limine* rulings spawned this amendment, the words "in limine" appear nowhere in the new language. That is not accidental. The Rule is intended to govern all evidentiary rulings, regardless of when they are made (i.e., at any time other than when the evidence is offered into the record at trial), and regardless of whether the court's ruling is precipitated by a motion labeled "in limine."

The fundamental concept is that, if the trial court has fully considered an evidentiary issue and finally resolved it, that ends the matter. There is no point in requiring the needless formality of bringing the issue to the judge's attention again, particularly not by putting the unsuccessful litigant at risk of losing appellate review of the judge's final decision.

3. Practice Issues

There are several practical issues that must be borne in mind in operating under this amendment.

First, the litigant who wishes to preserve the error for appellate review bears the burden of ensuring that the record clearly reflects that the ruling is "definitive." The best way is to ask the judge to answer that question directly—either at the time of the ruling, during the final pretrial conference, or at some other time, or in some other way, that ensures that the answer is on the record. The last thing the losing party wants is to litigate on appeal the question whether the trial judge's ruling was intended to be "definitive." If there is any doubt about the state of the record on this score, the only safe course is to renew the objection or proffer on the record at trial.

Second, the court can always change its mind. Nothing prevents a party from asking the judge to reconsider an issue in light of the evidence presented at trial. *In limine* rulings are necessarily predicated on assumptions as to pertinent facts. If the trial record proves inconsistent with the assumptions, a party may successfully request reconsideration, or the court may independently reverse itself. If the issue is reconsidered and the prior ruling reversed, the adversely-affected party must make an objection or proffer preserve appealability.

Third, during the comment period on this amendment in 1998–99, it was pointed out that pretrial evidentiary issues decided by magistrate judges raise special issues. Fed. R. Civ. P. 72(a) and 28 U.S.C. § 636(b)(1) each impose a ten-day deadline for objecting to magistrate judge determinations of "nondis-

positive matters" or proposed findings and recommendations to the district judge. Missing that ten-day deadline generally bars appellate review. The 2000 amendment to Rule 103(a) offers no safe harbor in this circumstance.

Fourth, the accompanying Committee Note stresses that nothing in this amendment changes the rule in criminal cases laid down in *United States v. Luce*, 469 U.S. 38 (1984). *Luce* holds that a criminal defendant who unsuccessfully moves *in limine* to suppress cross-examination on his prior convictions may not appeal that ruling if he thereafter declines to take the stand and submit to that cross-examination. (The draft of Rule 103(a) put out for public comment would have codified and extended *Luce* to civil cases. This was eliminated in the final draft, and the *Luce* discussion was relegated to the Committee Notes.)

Fifth, if you have lost a motion *in limine* to exclude evidence and want to remove the sting by offering it at trial, do you waive your right to appeal the *in limine* ruling? The Rule is silent on this question, and the Committee Note "does not purport to answer[it]." Rather, the Note cites cases from different Circuits coming down squarely on both sides of the issue.

B. Rule 404(a)(1): Evidence of Accused's Character

The amendment to Rule 404(a)(1) applies only in criminal cases, furnishing a new exception for prosecutors to the general rule prohibiting the introduction of character evidence. It provides that, *"if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404 (a)(2), evidence of the same trait of character of the accused offered by the prosecution"* is not excluded by Rule 404(a). This amendment was prompted by a flurry of bills in Congress which sought to do something similar but raised numerous drafting and other issues.

The amendatory language is different from that which was put out for public comment by the Advisory Committee in 1998. The exception as adopted is limited to "evidence of *the same* trait of character" of the victim. The Advisory Committee originally proposed a broader exception—for evidence of any "pertinent" trait of the victim's character. Since this amendment reverses centuries' worth of precedent, it was deemed prudent to limit its scope, and avoid opening a floodgate of litigation on difficult questions of "pertinence."

The amendment seeks to strike an even-handed balance. Unless the accused raises the issue of the victim's character under Rule 404(a)(2), then this new avenue of admissibility is not available to the prosecutor. That raises an important tactical issue for the defense.

In most cases, the defense has no need to raise the issue of the victim's character in such a was as to trigger this prosecutorial right—i.e., has no need to offer evidence of the character of the victim to prove that the victim acted in conformance therewith. If the defense merely puts in evidence as to the defendant's state of mind concerning the victim's aggressiveness, and does not offer the evidence to show that the defendant acted in conformity with that character at the time of the incident at issue, that can circumvent operation of this amendment.

C. Rule 701: Lay Opinion Testimony

1. Bright Line Between Lay & Expert Opinion

The amendment to Rule 701 is intended to more clearly demarcate the line between opinions that may be rendered by lay persons and those that may be rendered only by experts. By doing so, the amendment is designed to prevent circumvention of the pretrial disclosure rules relating to expert witnesses.

In civil actions, the pretrial disclosure requirements relating to expert witnesses are set forth in Fed. R. Civ. P. 26(a)(2). Subdivision (A) of that rule requires disclosure of "the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence." Subdivision (B) mandates a detailed written report from every "witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony." One way or the other, everyone who will offer expert testimony is, therefore, subject to disclosure.

In this context, the amendment to Rule 701 has an interesting lineage. Over the years, the line between Rules 701 and 702 became rather blurry, and a significant amount expert testimony began seeping in through Rule 701, in the guise of "lay expert" opinion. The theory was that, if a lay witness had a particular expertise, he or she could testify to what was essentially expert testimony under Rule 701. In these circumstances, no Rule 26(a)(2) disclosures were made, opening the door to a bit of trial-by-surprise.

Consider the common case of the Chief Financial Officer of a company who is a certified public accountant. The CFO is qualified to provide expert opinion on accounting matters. However, the CFO's duties do not "regularly involve giving expert testimony" within the meaning of Rule 26(a)(2)(B). Therefore, no expert report is required from the CFO. Consequently, if the CFO is permitted to testify as a "lay expert"—an oxymoron—then even the fact that he or she would provide expert opinion would not be disclosed under Rule 26(a)(2)(A), which is limited to 702, 703 or 705 testimony. In that circumstance, whether the CFO's expert opinions are even inquired into during discovery could be a matter of happenstance.

Equally important, the opinion testimony of witnesses like this—offered under Rule 701—would often not be scrutinized as carefully as Rule 702 expert testimony, since it was coming from a "lay" witness. This led to the incongruous result that less qualified witnesses were sometimes permitted to offer opinions that those more qualified were precluded from contesting.

The amendment to Rule 701 is designed to end this by making it clear that, if any witness is offering expert testimony, the admissibility of that testimony is to be gauged under Rule 702. The amended version of Rule 701 reads (excised language is stricken; new language is underscored):

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness~~, and~~ (b)

> helpful to a clear understanding of the witness' testimony or the determination of a fact in issue~~.~~, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

2. Test: Subject Matter of the Testimony

Under this amendment, the test is the subject matter of the testimony. If it conveys "scientific, technical or other specialized knowledge"—the same language that appears in Rule 702—then the testimony is judged under Rule 702, not 701. This has two repercussions. First, as 702 testimony, Rule 26(a)(2) disclosure obligations must be met. Second, the reliability requirements of Rule 702 apply. (As discussed below, Rule 702 has been amended to codify *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999).)

The accompanying Committee Note emphasizes that the Rule 701 amendment is not intended to change the law concerning the traditional types of testimony properly offered as lay opinion—*e.g.*, the owner of a business testifying as to its value or projected profitability. The Note cites approvingly Chief Judge Edward R. Becker's opinion in *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196 (3d Cir. 1995), which identifies many "prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701" and which flagged the major problems that ultimately led to adoption of the amendment.

The potentially problematic phrase in the amendment to Rule 701 is one that already appears in Rule 702—"other specialized knowledge." In some sense, all knowledge is "specialized," but this is clearly not what is meant, and it is not the way Rule 702 has ever been construed. The Committee Note addresses this issue by incorporating incorporates the helpful approach of *State v. Brown*, 836 S.W.2d 530 (Tenn. 1992). *Brown* distinguishes between 701 lay testimony, which "results from a process of reasoning familiar in everyday life," and 702 expert testimony, which "results from a process of reasoning which can be mastered only by specialists in the field." *Id.* at 539.

D. Rule 702: Expert Opinion Testimony

1. *Daubert/Kumho* Codified

Commentators debate whether the Supreme Court's opinions in *Daubert* and *Kumho Tire* significantly changed the law as to the admissibility of expert testimony. Be that as it may, these opinions have clearly revolutionized expert witness practice. The 2000 amendment to Rule 702 codifies *Daubert* and *Kumho Tire* by adding the following three-pronged conclusion to the existing text of the rule:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise~~.~~, if

> (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The amendment to Rule 702 changes the law in some Circuits (*e.g.*, the Second), in which *Daubert* was not read to apply to all types of expert testimony. The amendment reasons that the general requirements of sufficiency and reliability properly apply across the board, even if the illustrative factors mentioned in *Daubert* do not.

2. Quantitative & Qualitative Analyses

For practical purposes, these three criteria state the test that will be applied in *Daubert* motions on and after December 1, 2000. Prong (1) is "quantitative," according to the Committee Note, rather than "qualitative." The issue is one of sufficiency. Thus, even if the expert is properly relying on facts or data that are otherwise inadmissible under Rule 703, the quantum must be sufficient to satisfy prong (1) of Rule 702.

Prongs (2) and (3) invoke a qualitative analysis. The principles and methods must be both reliable and reliably applied. The reference to "principles" should not be off-putting. The word is not used in some onotologic sense that would preclude a mechanic from testifying as to problems in a car engine because of an inability to relate everything back to Newton's Laws. *Webster's* defines "principle" to include "the method of a thing's operation," and the *OED* includes "the general mode of construction or operation of a machine." In many instances this notion will apply.

In making the qualitative analysis under prongs (2) and (3), it is important to remember that, under *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997), the court may look at the expert's conclusions in assessing the reliability of the expert's methodology and the application to the facts.

3. Competing Expert Views

The Committee Note to Rule 702 stresses that a judicial finding that one expert's testimony *is* reliable does not necessarily lead to the conclusion that an opposing expert's testimony is *not*.

4. Industry Experts

The Note also makes it clear that the amendment is not intended to prevent a party from calling an "industry" expert to educate the judge or jury about general principles without specifically applying those principles to the facts of the case. That might seem to be in conflict with prong (3). The Note explains that, for an expert of this type, the "fit" requirement of prong (3) is satisfied as long as the testimony is relevant and reliable, and the witness is qualified.

5. Experts Qualified Solely by Experience

As a matter of both advocacy and admissibility, offering the testimony of experts whose qualifications are based solely on experience will require a good

deal of thought. The Committee Note recognizes that experience, alone, can be sufficient, but it also remarks that the judge's gatekeeping function "requires more than simply 'taking the expert's word for it.'" The proponent must focus on demonstrating the linkage between the expert's experience and his or her conclusions.

E. Rule 703: Basis of Expert Testimony

1. Closing the Back Door

For years, lawyers have used Rule 703 to place before the jury otherwise inadmissible data on which an expert's opinion is predicated. The 2000 amendment is intended to close this back-door to the introduction of hearsay and other incompetent information. The amendment (1) clarifies that it is only the expert's opinion that may rest on the inadmissible data, (2) presumptively precludes disclosure of the inadmissible data to the jury, and (3) erects a new balancing test which is weighted against disclosure, when the judge considers the issue.

The new rule reads:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence <u>in order for the opinion or inference to be admitted.</u> <u>Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.</u>

2. Reverse 403 Balancing Test

The balancing test contained in Rule 703 is just the opposite of the normal balancing test in Rule 403. Instead of allowing the evidence unless its prejudicial effect substantially outweighs its probative value (Rule 403's balance), Rule 703 bars introduction unless the probative value substantially outweighs prejudicial effect. There are some circumstances where this balance can be met (e.g., an x-ray relied upon by a testifying physician who did not take it). But this test is strict and is not intended to be casually satisfied.

3. Activities Performed, Not Substance Gleaned

The amendment does not prevent the proponent from eliciting for the jury the types of activities the expert performed, such as having reviewed documents, but there will be a line that the judge must draw as to how far the proponent can go. For example, there would not appear to be anything improper about experts testifying that they relied on newspaper or magazine articles in forming their opinions. Presumably some general discussion of the subject matter would be permissible. Too much detail—effectively disclosing just what

the articles said—is not permissible. This will be a fact-driven judgment for the trial judge.

4. Cross-Examination & Opening the Door

Nothing in this amendment will prevent cross-examination into the basis of the expert's opinion. However, this cross will open the door to the proponent to explore the basis more fully. Whether and to what extent to cross-examine the expert on this issue is a serious strategic issue under this amendment.

F. Rules 803 & 902: Self-Authentication of Business Records

At present, the federal courts face a rather anomalous situation. Business records of foreign companies are admissible in criminal trials under a simple, prescribed certification procedure, pursuant to 18 U.S.C. § 3505. But business records of American companies cannot be introduced in that fashion in criminal cases—and no business records can be admitted in civil cases without live testimony (or, more typically, a stipulation hammered out by a federal judge). The amendments to Rules 803 and 902 cure this anomaly.

The key amendments are in Rule 902(11) and (12). Rule 902(11) applies to domestic (United States) business records and provides a route for self-authentication in both civil and criminal cases. It requires a declaration by the "custodian or other qualified witness" in the form of an affidavit or declaration—e.g., pursuant to 28 U.S.C. § 1746—certifying that each underlying business record:

> (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those maters;
>
> (B) was kept in the course of the regularly conducted activity; and
>
> (C) was made by the regularly conducted activity as a regular practice.

These three subparts state the familiar criteria of Rule 803(6), the business records exception to the hearsay rule.

To prevent unfairness, there is a notice requirement built into Rule 903(11)—notice as to both the certification itself and the underlying records that it purports to authenticate. The requirement is stated as follows:

> A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

Rule 902(12) is a substantially identical provision that applies to foreign business records, but it extends only to civil cases because 18 U.S.C. § 3505 already provides a similar route to admissibility in criminal cases.

The amendment to Rule 803(6) is purely conforming. It authorizes the self-authentication by affidavit or declaration, by no longer demanding "testimony of the custodian or other qualified witness." It now also recognizes a "certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification" (e.g., 18 U.S.C. § 3505).

The most important practical aspect of this self-authentication mechanism is the notice requirement. Nothing will prevent any party from challenging the authenticity of documents that are certified by affidavit or declaration, but these amendments have the practical effect of shifting the burden of coming forward onto the opponent who is faced only with a certification. No longer can the opponent merely object to the document (*e.g.*, in the pretrial order) and demand a live witness to cross-examine at trial. Now that the certification does the job for the proponent, the opponent bears the burden of coming forward with evidence challenging authenticity.

It would be wise to build into the pretrial order a specific date by which the notice must be given, so that the opponent knows where it stands with respect to important, self-authenticating documents, and can plan accordingly.

There are interesting issues that these amendments do not address—e.g., business records of one company held by, and used in the ordinary course of business by, a second company. Presumably each embedded level will require the level of authentication currently required, which may or may not necessitate the testimony of the custodian of records of the company that originally produced the records. *See, e.g., MRT Constr. v. Hardrives, Inc.*, 158 F.3d 478, 483 (9th Cir. 1998) (no additional testimony required when the company possessing the records keeps them in ordinary course and " has a substantial interest in the accuracy of the records"). The question is ultimately a hearsay-within-hearsay issue under Rule 806, with authentication overtones.

BIOGRAPHIES

Planning Chairs

Gregory P. Joseph, New York, New York
Fried Frank Harris Shriver & Jacobson
B.A., J.D., University of Minnesota
Government and Public Service: U. S. Judicial Conference Advisory Committee on the Federal Rules of Evidence (1993-99); Advisory Committee on Civil Practice of the New York State Unified Court System (1999-); Assistant U.S. Special Prosecutor (1981-82)
Memberships: The American Law Institute; American Bar Association (Section of Litigation: Chair, 1997-98); American College of Trial Lawyers (Fellow; Chair, Downstate New York Committee, 1996-98); New York State Bar Association (Chair, Trial Evidence Committee, 1989-94); Association of the Bar of the City of New York (Executive Committee, 1999- ; Chair, Professional Responsibility Committee, 1993-96)
Publications Include: MODERN VISUAL EVIDENCE (1984, 2000 Supp.); SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE (Lexis, 3d Ed. 2000); CIVIL RICO: A DEFINITIVE GUIDE (American Bar Association, 2d Ed. 2000); EVIDENCE IN AMERICA (Co-Author)(4 vols., 1987), EMERGING PROBLEMS UNDER THE FEDERAL RULES OF EVIDENCE (General Editor) (1983; 2nd edition 1991); MOORE'S FEDERAL PRACTICE (Editorial Board)

Sol Schreiber, New York, New York
Milberg Weiss Bershad Hynes & Lerach LLP
B.A., City College of New York; LL.B., Yale University
Adjunct Professor, Fordham Law School (1972-87)
Government Service: United States Magistrate, Southern District of New York (1971-78); Court-Appointed Special Master: In Re Pan Am Air Disaster (Lockerbie) (1994-), Marcos Human Rights Litigation (1994-95), Agent Orange Litigation (1982-84);
Honors: Francis Rawle Award (ALI-ABA 1985); Presidential Award (Legal Aid Society 1984)
Memberships: The American Law Institute (Members Consultative Group, Complex Litigation Project); American Bar Association (Chair, Federal Asbestos Legislation Committee, Tort and Insurance Practice Section, 1986-87)
Publication: RESOURCE MATERIALS: CIVIL PRACTICE AND LITIGATION IN FEDERAL AND STATE COURTS (ALI-ABA 8th Ed. 1998, 7th Ed. 1996, 6th Ed. 1994); MOORE'S FEDERAL PRACTICE (3d Ed.) (Board of Editors)

Faculty

John M. Kobayashi, Denver Colorado
The Kobayashi Law Firm, P.C.
B.A., J.D., Columbia University
Government and Public Service: Assistant United States Attorney, District of Colorado (1974-76); Trial Attorney, Securities and Exchange Commission, Division of Corporate Finance, Denver Regional Office (1973-74); Voting Member, Advisory Committee on the Federal Rules of Evidence (1992-2000); Colorado Legal Aid Society (Legal Aid Steering Committee, 1988-89)
Memberships: The American Law Institute; American Bar Association (Corporate Counsel Section, Products Liability Committee Task Force on Reengineering Management and Cost Control of Litigation and ADR); American College of Trial Lawyers (Fellow; State Committee Member); International Academy of Trial Lawyers (Fellow; Board of Directors, 1990-); International Association of Defense Counsel; International Society of Barristers (Fellow); National Association of Criminal Defense Lawyers; American Trial Lawyers Association; American Bar Foundation (Fellow); Colorado Bar Association (Board of Governors, 1979-81 and 1983-85); Colorado Bar Foundation (Fellow)

Myles V. Lynk, Tempe, Arizona
Distinguished Visiting Scholar, Arizona State University State College of Law
A.B., J.D., Harvard University
Visiting Professor of Law, George Washington University National Law Center (1990-91)
Government and Public Service: U. S. Judicial Conference Advisory Committee on Civil Rules; Committee on Pro Se Litigation (D.D.C.)(former chair); District Courts' Civil Justice Reform Act Advisory Group; Attorney, Special Counsel to the Committee on Standards of Official Conduct, U.S. House of Representatives (1983-84); Assistant Director for Transportation and Maritime Policy on the White House Domestic Policy Staff (1980); Special Assistant to the Secretary of Health, Education and Welfare (1979); Law Clerk to Damon J. Keith (Sixth Circuit)(1976-78)
Honors: Presidential Award (National Bar Association 1992); President's Compass Award for Outstanding Service (National Bar Association 1989)
Memberships: The American Law Institute; American Bar Association (Business Law Section Delegate to the House of Delegates; Minority Caucus, Commission on Racial and Ethnic Diversity in the Profession); American Bar Foundation (Fellow); National Bar Association (Chair, Legal Education Committee, 1992); National Conference of Bar Presidents Inc. (former member of Executive Council); District of Columbia Bar (past president; founding member, Conference on Opportunities for Minorities in the Legal Profession)

Lee H. Rosenthal, Houston, Texas
United States District Judge for the Southern District of Texas (appointed 1992)
B.A., J.D., University of Chicago
Other Government and Public Service: U. S. Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure (Chair, subcommittee studying class actions; Member: subcommittee studying proposed changes to the discovery rules; working group studying mass torts); Chair, Fifth Circuit Judicial Conference (1999); MANUAL FOR COMPLEX LITIGATION (Board of Editors)(Federal Judicial Center 1998); Law Clerk to Hon. John R. Brown (5th Cir.)(1977-78)
Honors: Trial Judge of the Year 2000 (Texas Association of Civil Trial and Appellate Specialists)
Memberships: The American Law Institute (Consultative Group for Transnational Rules of Civil Procedure); American Bar Association (Litigation Section Federal Practice Task Force; Antitrust Law Section Task Force on Civil Antitrust Litigation Issues); (American Bar Foundation (Fellow);Texas Bar Foundation (Fellow)
Publications Include: FIFTH CIRCUIT TRIAL PRACTICE GUIDE (chapter author and section editor) (Thomson Legal Publishing); UNIVERSITY OF CHICAGO LAW REVIEW (Advisory Board 1996)

Stephen A. Saltzburg, Washington, D.C.
Howrey Professor of Trial Advocacy, Litigation and Professional Responsibility, George Washington University Law School; Co-Director, University of Virginia Trial Advocacy Institute
A.B., Dickinson College; J.D., University of Pennsylvania
Professor of Law, University of Virginia (1972-90, Class of 1962 Chairholder, 1987-90)
Government and Public Service: Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice (1988-89); Associate Independent Counsel, Iran-Contra Investigation (1987-88); Advisory Committee on the Federal Rules of Criminal Procedure (Member and Reporter); Advisory Committee on Federal Rules of Evidence (Liaison Member, 1993-); Civil Justice Reform Act Committee (D.D.C.) (Reporter, then Chair); Project Director, Tax Refund Fraud Task Force, U.S. Treasury Department (1994-95); U.S. Department of Defense Code Committee (1989-92); U.S. Sentencing Commission (ex officio) (1989-90)
Honors: Francis Rawle Award (ALI-ABA 2000)
Special Master: *Hammon v. Barry* (D.D.C., 1990-94); *Hartman v. Gelb* (D.D.C., 1991-)

Memberships: The American Law Institute; American Bar Association (Chair, Criminal Justice Section Committee on Trial Advocacy, 1990- ; Vice-Chair, Litigation Section Committee on Trial Evidence, 1991- ; Special Committee on the Prosecution Function, 1991-93); American Trial Lawyers Association (Reporter, Task Force on Litigation Issues, 1986-88); National Institute of Justice Less than Lethal Liability Panel (1993-)

Publications Include: FEDERAL RULES OF EVIDENCE MANUAL (Co-Author) (7th Ed., Michie, 1997); AMERICAN CRIMINAL PROCEDURE (Co-Author) (4th Ed., West 1992); BASIC CRIMINAL PROCEDURE (Co-Author) (1994); MILITARY EVIDENTIARY FOUNDATIONS (Co-Author) (1994); CRIMINAL LAW: CASES AND MATERIALS (Co-Author); EMERGING PROBLEMS UNDER THE FEDERAL RULES OF EVIDENCE (Reporter) (2d Ed., 1991); EVIDENCE IN AMERICA (Co-Author) (Michie 1987); FEDERAL CRIMINAL JURY INSTRUCTIONS (Co-Author) (Michie, 2d Ed. 1991); MILITARY RULES OF EVIDENCE MANUAL (Co-Author) (Michie 1985); A MODERN APPROACH TO EVIDENCE (Co-Author) (2d Ed., West 1982)

Shira Ann Scheindlin, New York, New York

Judge, United States District Court for the Southern District of New York (appointed 1994)

B.A., University of Michigan; M.A., Columbia University; J.D., Cornell University

Adjunct Professor of Law, Brooklyn Law School (1983-98)

Other Government and Public Service: United States Magistrate Judge, Eastern District of New York (1982-86); General Counsel, City of New York Department of Investigation (1981-82); Assistant U.S. Attorney, Eastern District of New York (1977-81); Law Clerk to Charles L. Brieant, Jr. (S.D. of New York, 1976-77)

Memberships: U. S. Judicial Conference Advisory Committee on the Federal Rules on Civil Rules; Second Circuit Judicial Conference Planning Committee; Bankruptcy Judge Selection Committees, Southern District of New York and Eastern District of New York; Federal Bar Council; Judicial Resource Center; Magistrate Judge Selection Committee, Eastern District of New York; New York State Bar Association (Advisory Committee on Civil Rules; House of Delegates, Section on Commercial and Federal Litigation, chair)

Fern M. Smith, Washington, D.C.

Director, The Federal Judicial Center

Judge, United States District Court for the Northern District of California (appointed 1988; inactive status 7/99-7/03)

B.S., J.D.: Stanford University

Other Government and Public Service: U. S. Judicial Conference Advisory Committee on the Federal Rules of Evidence (Chair, 1996-99; Member, 1993-96); Ninth Circuit Judicial Conference (Executive Committee, 1994-96; Council, 1990-93); Superior Court of the State of California, San Francisco County (1986-88); California Judicial Council (1987-88; Advisory Task Force on Gender Bias, 1988-90)

Program Evaluation for
New Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence

Please indicate your position in the court:

☐ Judge

☐ Law clerk

☐ Other

1. What is your overall evaluation of the program? (*please circle one*)

1	2	3	4	5
Poor				Excellent

2. How would you describe the length of the program?

1	2	3	4	5
Too short				Too long

3. How would you rate the program as an overview of important current issues regarding federal rules amendments?

1	2	3	4	5
Poor				Excellent

4. What is your overall evaluation of the program faculty?

1	2	3	4	5
Poor				Excellent

5. Did you learn things about the issues discussed in the program that you did not know before watching the program?

☐ yes ☐ no

6. What suggestions do you have for improving future Center programs for judges on the FJTN (additional comments on a separate sheet are welcome):

7. Did you view the program via the FJTN broadcast or later via videotape?

☐ broadcast ☐ videotape

Please fax your completed form to the Federal Judicial Center at 202-502-4299. No cover sheet is necessary. Thank you.